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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

LOUIS E. OLIVERO, Appellant

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Appellee.

ON APPEAL FROM THE
ILLINOIS SUPREME COURT

JURISDICTIONAL STATEMENT

LOUIS E. OLIVERO
Pro Se
1615 Fourth Street
P. O. Box 526
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JURISDICTIONAL STATEMENT

Pursuant to Rules 10 and 15 of the Rules of the Supreme Court of the United States, appellant, Louis E. Olivero, files this statement of the basis upon which it is contended that the Supreme

Court of the United States has jurisdiction to review the judgment entered by the Illinois Supreme Court in this case and should exercise such jurisdiction herein.

QUESTIONS PRESENTED

1. WHETHER THE ILLINOIS SUPREME COURT IMPROPERLY REFUSED TO CONSIDER THE ISSUE OF THE CONSTITUTIONALITY OF CERTAIN PROVISIONS OF ILLINOIS SUPREME COURT RULE 413.

2. WHETHER THE ILLINOIS SUPREME COURT IMPROPERLY REFUSED TO RULE CONCERNING THE STATE'S ATTORNEY'S ALLEGED ABUSES OF THE GRAND JURY PROCEDURE AND WHETHER THESE ALLEGED ABUSES ARE REPUGNANT TO THE UNITED STATES CONSTITUTION.

3. WHETHER THE ILLINOIS SUPREME COURT IMPROPERLY REFUSED TO CONSIDER THE QUESTION OF VIOLATION OF APPELLANT'S RIGHTS GUARANTEED HIM BY THE FIRST

AMENDMENT TO THE UNITED STATES CONSTITUTION.

4. WHETHER THE ILLINOIS SUPREME COURT IMPROPERLY REFUSED TO CONSIDER THE QUESTION OF DENIAL TO APPELLANT OF HIS RIGHT TO TRIAL BY JURY GUARANTEED BY THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

LIST OF ALL PARTIES IN ILLINOIS SUPREME COURT

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TABLE OF AUTHORITIES

Cases:

United States v. Mandujano, 425 U.S. 564, 595, 96 S.Ct. 1768, 48 L.Ed.2d 212, Justices Brennan and Marshall, concurring opinion, citing Lawn v. United States, 355 U.S. 339, 2 L.Ed.2d 321, 78 S.Ct. 311 and United States v. Calandra,

414 U.S. 345, 346, 38 L.Ed.2d 561, 94 S.Ct. 613.

Wardius v. Oregon, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82.

Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446.

Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522.

New York Times Co. v. Jascalevich, 439 U.S. 1317, 99 S.Ct. 6, 58 L.Ed.2d 25.

Hamilton v. Regents of the University of California, 293 U.S. 245, 257, 55 S.Ct. 197, 79 L.Ed. 343.

Chicago & E.I.R. Co. v. Industrial Commission, 284 U.S. 296, 52 S.Ct. 151, 76 L.Ed. 304.

People v. Hummel, 38 Ill.App.3d 233, 347 N.E.2d 305.

County of McLean v. Kickapoo Creek, Inc., 51 Ill.2d 353, 282 N.E.2d 720.

People v. Williams, 87 Ill.2d 161, 429 N.E.2d 487, 57 Ill.Dec. 589.

Constitution:

First Amendment

Fourth Amendment

Fifth Amendment

Sixth Amendment

Fourteenth Amendment, Section 1

Statutes:

28 U.S.C. Sec. 1257 (2, 3)

28 U.S.C. Sec. 2103

Illinois Revised Statutes, Chapter 110A, Section 315(a).

Illinois Revised Statutes, Chapter 110A, Section 413(d)

Illinois Revised Statutes, Chapter 110A, Sections 414(a) and (b)

Miscellaneous:

Total Pre-Trial Disclosure to the State: A Requiem to the Accusatorial System, 60 Illinois Bar Journal 534.

OPINIONS BELOW

The order of the Illinois Supreme Court has yet to be published and is included herein as Appendix A.

The opinion of the Third District Appellate Court of Illinois is published at _____ Ill.App. _____, 461 N.E.2d 549, 77 Ill.Dec. 926, and appears herein as

Appendix B.

The order of the Circuit Court of Bureau County is unpublished and appears herein as Appendix C.

GROUNDS OF JURISDICTION OF SUPREME COURT

This appeal arises from the Illinois Supreme Court's denial of leave to appeal the Third District Appellate Court of Illinois' affirmance in part and modification in part of an order of the Circuit Court of Bureau County, Illinois, finding Louis E. Olivero in contempt of court for refusing to proceed with a trial.

Clearly, the judgment sought to be reviewed is a "final" one for purposes of invoking this Court's jurisdiction under 28 U.S.C. Sec. 1257(2) to review judgment rendered by the highest court of the State of Illinois within which

review might be had. New York Times Co. v. Jascalevich, 439 U.S. 1317, 99 S.Ct. 6, 58 L.Ed.2d 25, holds that a judgment of civil or criminal contempt entered against a non-party witness is sufficient to satisfy the finality requirement. 439 U.S. 1317, 1319. There can be no serious question that the judgment of contempt sought to be reviewed herein is a final one for purposes of appeal to the United States Supreme Court.

The judgment sought to be appealed is inextricably intertwined with the interpretation of Illinois Supreme Court Rule 413. That rule fits well within the definition of a "statute" of a state as the term is understood in cases interpreting 28 U.S.C. Sec. 1257(2). See, e.g., Hamilton v. Regents of the University of California, 293 U.S. 245, 257, 55 S.Ct. 197, 79 L.Ed. 343, where

"statute of any state" is defined as not limited to the act of a state legislature, but encompasses "every act legislative in character to which the state gives sanction, no distinction being made between acts of the state Legislature and other exertions of the state lawmaking power". [Citations omitted.]

The Illinois Supreme Court in People v. Williams, 87 Ill.2d 161, 429 N.E.2d 487, 57 Ill.Dec. 589, stated as follows:

> "A rule adopted by this court is an expression of its inherent or constitutional power which, upon its effective date, becomes law the same as a statute or the law in a given case."

Thus, by the Illinois Supreme Court's own interpretation, its rule making is an exercise of the state's lawmaking power.

Furthermore, the United States

Supreme Court's jurisdiction attaches to the instant appeal despite the fact that the Illinois Supreme Court, in the exercise of its discretion, declined to reach the merits of the dispute, but rather denied the petition for leave to appeal under Illinois Supreme Court Rule 315(a), made applicable to criminal appeals by Illinois Supreme Court Rule 612(b). Whether or not the Illinois Supreme Court reached the merits of the controversy, appellant has exhausted his state remedies. Compare Chicago & E.I. R. Co. v. Industrial Commission, 284 U.S. 296, 52 S.Ct. 151, 76 L.Ed. 304, where this Court held that certiorari to the circuit court was proper after the Illinois Supreme Court had declined to review an Industrial Commission award. Nevertheless, should this Court decide that it lacks jurisdiction under 28

U.S.C. Sec. 1257(2) to consider this appeal, then appellant submits that the questions raised by the instant controversy present an appropriate occasion for treatment, under 28 U.S.C. 2103, of this jurisdictional statement as a petition for writ of certiorari under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment of the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourth Amendment of the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment of the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment of the United States

Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment, Section 1 of the United States Constitution provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. Sec. 1257 provides in part as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

28 U.S.C. Sec. 2103 provides as follows:

> "If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State, or of a United States court of appeals, in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken. Where in such case there appears to be no reasonable ground for granting a petition for writ of certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs."

Section 315(a) of Chapter 110A of Illinois Revised Statutes provides:

> "A petition for leave to appeal to the Supreme Court from the Appellate Court may be filed by any party, including the State, in any case not appealable from the Appellate Court as a matter of right. Whether such a petition will be granted is a matter of sound judicial discretion. The following,

> while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: the general importance of the question presented; the existence of a conflict between the decision sought to be reviewed and a decision of the Supreme Court, or of another division of the Appellate Court; the need for the exercise of the Supreme Court's supervisory authority; and the final or interlocutory character of the judgment sought to be reviewed."

Section 413(d) of Chapter 110A of Illinois Revised Statutes provides:

> "Subject to constitutional limitations and within a reasonable time after the filing of a written motion by the State, defense counsel shall inform the State of any defenses which he intends to make at a hearing or trial and shall furnish the State with the following material and information within his possession or control:
>
> (i) The names and last known addresses of persons he intends to call as witnesses together with their relevant written or recorded

> statements, including memoranda reporting or summarizing their oral statements, any record of prior criminal convictions known to him; and
>
> (ii) any books, papers, documents, photographs, or tangible objects he intends to use as evidence or for impeachment at a hearing or trial;
>
> (iii) and if the defendant intends to prove an alibi, specific information as to the place where he maintains he was at the time of the alleged offense."

Sections 414(a) and (b) of Chapter 110A of Illinois Revised Statutes provide:

> "(a) If it appears to the court in which a criminal charge is pending that the deposition of any person other than the defendant is necessary for the preservation of relevant testimony because of the substantial possibility it would be unavailable at the time of hearing or trial, the court may, upon motion and notice to both parties and their counsel, order the taking of such person's deposition under oral examination or written questions for use

as evidence at a hearing or trial."

"(b) The taking of depositions shall be in accordance with rules providing for the taking of depositions in civil cases, and the order for the taking of a deposition may provide that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place."

STATEMENT OF THE CASE

On November 9, 1982, Paul Powers, hereinafter defendant, was indicted for the crime of arson by the grand jury of Bureau County, Illinois. Shortly thereafter defendant retained appellant, who duly entered his appearance in the Circuit Court of Bureau County as attorney for defendant and entered a plea of not guilty.

In statements given on November 7, 1982, the state's witnesses against de-

fendant had alleged that defendant had admitted burning a structure housing a tavern business which competed with an adjoining tavern owned by defendant's brother-in-law, Ted Errio. These witness statements further alleged Mr. Errio's involvement as a co-conspirator with defendant. Ted Errio was at the time married to Nina Powers Errio, who assisted in operation of his business.

On August 5, 1983, as is required by Illinois Supreme Court Rule 413 (d) (i), appellant disclosed to the State's Attorney of Bureau County that he intended to call Nina Powers and Ted Errio as witnesses for defendant at trial.

On August 8, 1983, three days after being informed by the defense that Ted Errio and Nina Powers would be defense witnesses, and many months after defendant had been indicted, and after the

witness Nina Powers had been contacted by the State's Attorney of Bureau County, the State's Attorney of Bureau County subpoenaed Errio and Ms. Powers to testify before the Bureau County Grand Jury.

On August 10, 1983, Nina Powers testified before the Grand Jury. The State's Attorney began the questioning with the following remarks:

> "All right. What I am concerned about is hearing what you'll say about the case which we've charged your brother with."

The Bureau County State's Attorney thereupon conducted a wide-ranging examination of Nina Powers concerning virtually every aspect of her knowledge of the pending charges against defendant.

On August 22, 1983, appellant filed a motion for injunctive relief to prevent transcription or use of Nina

Powers' grand jury testimony by the State's Attorney. The motion was denied by the trial court.

On August 26, 1983, appellant received a transcript of Nina Powers' grand jury testimony taken on August 10, 1983, immediately filed an application to say proceedings as well as a notice of appeal of the denial of appellant's motion for injunctive relief and so informed the trial court. Defendant's trial had been scheduled to commence on August 29, 1983 at 10:00 A.M.

On August 29, 1983, appellant argued to the trial court among other matters that the Illinois Supreme Court Rules relating to criminal discovery are unconstitutional insofar as they require pre-trial disclosure by defendants. Appellant argued further that the State's Attorney had abused the grand jury pro-

cess for purposes of taking a pre-trial discovery deposition of a defense witness, a procedure not permitted under Illinois law except for the purpose of perpetuating testimony. See Illinois Supreme Court Rule 414. The trial court nevertheless struck defendant's notice of appeal, and ordered appellant to begin trial as previously scheduled.

At 1:00 P.M. on August 29, 1983, appellant filed an application to stay the criminal trial of People v. Powers and before 1:30 P.M. informed the trial court of the filing. Although appellant renewed all of his arguments raised in the earlier motion hearing, the trial judge rejected all of appellant's arguments and found him in direct criminal contempt of court, sentencing him to pay a fine of $1,009.00.

On March 9, 1984, the Third Dis-

trict Appellate Court of Illinois affirmed the lower court's finding of contempt but reduced the fine to $500.00 since appellant was not afforded a jury trial and did not waive that right. People v. Powers, _____ Ill.App. _____, 461 N.E.2d 549, 77 Ill.Dec. 926. Appellant filed a timely petition for appeal as a matter of right in the Illinois Supreme Court, praying in the alternative for leave to appeal. On July 6, 1984, the Illinois Supreme Court denied leave to appeal. This appeal followed.

SUBSTANTIALITY OF FEDERAL QUESTIONS

This appeal presents important and substantial questions, as hereinafter described, in that:

1. Illinois Supreme Court Rule 413 is repugnant to the Fifth, Sixth and Fourteenth Amendments to the United

States Constitution.

2. The State's Attorney's abuses of the grand jury procedure, for his opposition to which appellant was found in contempt, are repugnant to the Fourth, Sixth and Fourteenth Amendments to the United States Constitution.

3. Appellant's right to freedom of speech guaranteed to him by the First Amendment to the United States Constitution was violated by the order of contempt found against him.

4. Appellant's right to trial by jury guaranteed to him by the Sixth and Fourteenth Amendments of the United States Constitution was violated.

A time-honored means which has been recognized by Illinois courts for challenging the validity of a trial court's discovery order in a criminal case has been for counsel to oppose the trial

court's order of production, allow himself to be found in contempt and a nominal fine imposed against him. (See, e.g., People v. Hummel, 38 Ill.App.3d 233, 347 N.E.2d 305, where an assistant State's Attorney was held in contempt and fined 10¢ for an alleged refusal to comply with a pre-trial discovery order in a felony case.) All issues bearing on the propriety of the discovery order are then called into question.

In the case at bar, appellant vigorously argued the unconstitutionality of Illinois pre-trial discovery rules calling for disclosure by criminal defendants. He additionally argued that the State's Attorney had compounded the prejudice to defendant which is inherent in Rule 413 by taking advantage of defendant's Rule 413 disclosure of witnesses and deposing one of those

witnesses before the grand jury on the eve of trial solely for purposes of discovery. The State's Attorney admitted at the outset of his grand jury interrogation of Nina Powers that he sought her testimony solely for discovery purposes relating to the impending trial of defendant. See Facts of the Case, page 20.

If, as this Court's opinions have held, (United States v. Mandujano, 425 U.S. 564, 595, 96 S.Ct. 1768, 48 L.Ed.2d 212, Justices Brennan and Marshall, concurring opinion, citing Lawn v. United States, 355 U.S. 339, 2 L.Ed.2d 321, 78 S.Ct. 311 and United States v. Calandra, 414 U.S. 345, 346, 38 L.Ed.2d 561, 94 S.Ct. 613), compelling an accused to be a witness against himself by calling him to testify after his indictment is repugnant to the constitution, how may

it be said that a practice of summoning witnesses against the accused to testify before a grand jury after indictment of the accused furthers any proper purpose? Once an indictment has been returned against the accused, the grand jury's legitimate concern with that accused is essentially at an end unless additional indictments are sought against him, which was not the case here.

The report of proceedings before the Bureau County grand jury will show, and the State's Attorney has admitted in arguments to the trial court in chambers, that no indictment was sought against Nina Powers. The conclusion is inescapable that the Bureau County State's Attorney subpoenaed Nina Powers before the grand jury for the sole purpose of obtaining pre-trial discovery for use against the defendant under the

guise of a grand jury investigation.

Appellant foresaw the thorny problems of denial to his client, Paul Powers, of effective right to confront and cross-examine witnesses guaranteed him under the Fifth Amendment to the United States Constitution, as a result of the State's Attorney's abuse of the grand jury process. That is, while the State's Attorney arrogated the power to himself to depose Nina Powers, defendant had no corresponding right to confront and cross-examine the witness under oath before the grand jury.

Permitting the prosecution to abuse compulsory process so as to extract pre-trial testimony from defense witnesses, in a setting uniquely insulated from any defense opportunity to object, cross-examine or clarify, violates defendant's Fourth, Sixth and Fourteenth

Amendment rights. Appellant took it upon himself to challenge the violation of those rights and because of that challenge he was found in contempt.

It cannot be emphasized too strongly that the very reciprocity that this Court identified as the sine qua non of constitutional validity of pre-trial criminal discovery, is completely absent here. That is, although the State's Attorney by his abuse of the grand jury process assumed the power to order and take a discovery deposition of a defense witness, the defense under Illinois procedure was totally denied the corresponding power to depose the prosecution's witnesses.

Such asymmetry flies in the face of Wardius v. Oregon, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82. It must be remembered that Illinois Supreme Court

Rules provide evidence depositions only to preserve testimony because of substantial possibility the witness will be unavailable at hearing or trial (Illinois Supreme Court Rule 414(a)) and also no provision is made for discovery depositions in any criminal case. The prosecution witnesses are, of course, under absolutely no obligation to grant an interview with defense counsel, and ordinarily do not.

This Court has never passed upon the constitutionality of Illinois Supreme Court Rule 413 and specifically Supreme Court Rule 413(d)(1) which requires the defense to disclose the names and last known addresses of persons he intends to call as witnesses. Appellant submits that a list of names and addresses of witnesses the defense intends to call at trial is testimonial

and communicative in nature since the primary source for identity of witnesses will ordinarily be the defendant himself.

Williams v.Florida, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446, did not go so far as to countenance the broad and sweeping scope of disclosure by the accused which is mandated under Illinois Supreme Court Rule 413. Williams v. Florida concerned itself with the alibi defense, which is in the nature of an affirmative defense and uniquely likely to take the prosecution by surprise. In the William v. Florida situation, reciprocal disclosure of alibi witnesses by defense and prosecution may not offend the constitution. It is a totally separate and distinct inquiry whether reciprocity of disclosure by the state is sufficient to cure the constitutional

defects of Illinois Supreme Court Rule 413.

In addition to Fifth Amendment objections as to the compelled self-incrimination which Rule 413 requires, equally troublesome questions of denial of effective assistance of counsel arise, since counsel is in effect compelled by force of the rule to violate his obligations of zealous advocacy and preservation of the confidences and secrets of the client.

Commentators have noted that Rule 413 in effect transforms defense counsel into a conduit channeling information he has obtained from the defendant to the prosecution. See, e.g., Total Pre-Trial Disclosure to the State: A Requiem to the Accusatorial System, James J. Doherty, 60 Illinois Bar Journal 534, wherein Mr. Doherty makes the point that

the pessimistic predictions of Mr. Justice Black in his Williams v. Florida dissent, 399 U.S. 78, 114, 115, have come to pass in Illinois.

Appellant's freedom of speech was violated by the judgment of contempt against him. An attorney like any other individual is guaranteed freedom of speech by the First Amendment to the United States Constitution and an attorney perhaps more than any other individual must rely on that freedom in practicing and advancing his profession. Appellant's closely-related right to petition the government for redress of grievances was similarly violated by the contempt order. One hallmark of the right of freedom of speech, espcially as it involves attorneys, is the calm and orderly discourse it engenders.

During the trial court proceedings

appellant argued firmly held convictions, supported by legal analysis, in the trial judge's chambers. When the trial judge disagreed with the position expressed by appellant, appellant offered in accordance with generally accepted Illinois practice to submit himself to the contempt power of the court in order to test his good faith belief in the correctness of his position. Because appellant's purpose was to test the trial court's rulings on discovery, it offends the principles of freedom of speech to impose more than a nominal fine upon appellant's good faith approach. Specifically, the fine of $1,009.00 was so excessive as to violate sound constitutional principles and constituted a penalty imposed against defendant for good faith expression of his freedom of speech and his right to

petition the government.

Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522, holds there is a right to jury trial in cases involving serious contempts. The magnitude of the fine imposed herein leaves no doubt that the trial judge regarded appellant's alleged contempt as a serious one. That being the case, the summary imposition of a heavy fine deprived appellant of his fundamental right to trial by jury. The violations of appellant's Sixth and Fourteenth Amendment rights in this regard were not cured by the Third District Appellate Court of Illinois' sua sponte reduction of the fine to $500.00. The violation of appellant's right to trial by jury vitiates the entire order of contempt, not merely that portion of the fine exceeding $500.00. Infringement of

appellant's basic constitutional rights cannot be so easily cured.

The Third District Appellate Court's opinion below cites only one case, County of McLean v. Kickapoo Creek, Inc., 51 Ill.2d 353, 282 N.E.2d 720, as authority in support of its reduction of the fine from $1,009.00 to $500.00, and does not directly address Bloom v. Illinois. However, the Illinois Supreme Court in County of McLean v. Kickapoo Creek, Inc. did cite Bloom v. Illinois and rather than summarily reducing the fine to the $500.00 maximum allowed where defendant is not granted a jury trial, reversed and remanded the case for a new trial. The Illinois Supreme Court stated at page 722 of the Northeastern Reporter Second Series as follows:

> "Where no maximum penalty is authorized, the seriousness of the charge is to be determined

> by the severity of the actual sentence (Frank v. United States, 395 U.S. 147, 89 S.Ct. 1503, 23 L.Ed.2d 162; Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522; Cheff v. Schnackenberg, 384 U.S. 373, 86 S.Ct. 1523, 16 L.Ed.2d 629)."

Because the seriousness of the offense is defined by the severity of the actual sentence imposed, it is thoroughly arbitrary and unprincipled and fails to cure constitutional defects for a court of review to simply reduce the fine imposed and thereby evade the issues of appellant's right to jury trial.

The cause should have been reversed and remanded for a full hearing before a jury, and the Illinois Supreme Court's failure to so order is violative of appellant's constitutional rights.

Respectfully submitted,

LOUIS E. OLIVERO

APPENDIX

A.

Order entered by the Illinois Supreme Court on June 5, 1984 in words and figures as follows:

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause. Ryan C. J., took no part.

The mandate of this Court will issue to the Appellate Court on June 27, 1984.

B.

Opinion of the Third District Appellate Court filed March 9, 1984 in words and figures as follows:

Mr. JUSTICE HEIPLE delivered the Opinion of the Court:

Louis Olivero appeals from an order of the Circuit Court of Bureau County

finding Olivero in contempt of court for refusing to proceed with a trial.

Olivero, a lawyer, was representing his client, Powers, in an arson case. Olivero filed a motion for a temporary restraining order (TRO) with the trial court in order to prevent the State from transcribing and using certain testimony obtained in a grand jury proceeding. Olivero felt the testimony was improperly obtained and would be used by the State in preparing its case against Powers. The trial court refused to grant the TRO and set Powers' trial for August 29, 1983. Powers, through Olivero, filed an interlocutory appeal to this court.

On August 29, 1983, just prior to trial, Olivero argued to the trial court that Powers' appeal relieved the lower court of jurisdiction. The State moved

to quash the appeal because Powers had no right to an interlocutory appeal in his criminal case. The trial judge observed that a trial court only loses jurisdiction when a proper appeal is filed. Since Powers' interlocutory appeal was not authorized by any law or rule, his appeal was not proper; consequently, the trial court did not lose jurisdiction. The trial judge granted the motion to quash the appeal. Yet, Olivero continued to argue the lower court had no jurisdiction over the case.

Despite the trial judge's repeated attempts to convince Olivero that his position was untenable, Olivero indicated that neither he, nor his client, would participate in the trial. The trial judge then warned Olivero that if Olivero did not start the trial, he would be held in contempt and fined

$1,009 ($806 for jury fees, $153 for mileage and $50 for two bailiffs). Olivero refused to comply with the judge's request and the judge proved true to his word. This appeal followed.

Before examining the contempt issue, we would like to note that a review of the record of the Powers case, and the briefs of the parties, reveals no grounds to support the granting of a TRO. Moreover, we know of no authority which will allow an interlocutory appeal by Powers of the denial of the TRO in his criminal case. In order to restrict the use of the grand jury testimony, Olivero should have submitted a motion in limine or a motion to suppress. However, such evidentiary issues cannot be appealed by a defendant until a final disposition of his case.

In short, we find a glaring lack of

authority in support of the theories which Olivero apparently believed justified his refusal to participate in Powers' trial. Nevertheless, even if the law did support Olivero's arguments, we could not and will not countenance his conduct before Judge Wampler. A lawyer's good faith belief in the accuracy of his argument, or his ignorance of the law, or the absence of contemptuous intent, is no justification for his acts of contempt. (See People v. Hass (1981), 100 Ill. App. 3d 1143.) A lawyer's actions before the court speak louder than his words.

This is not a case of indirect criminal contempt where the attorney missed an appearance date and the trial court was unaware of the reason for the absence. (See People v. McNeil (1976), 42 Ill. App. 3d 1036). Here, we have a

case of direct criminal contempt. The lawyer and judge were face to face shortly before trial. Judge Wampler explicitly instructed Olivero that if he did not participate in the trial, he would be held in contempt. Olivero deliberately chose not to respect the wishes of the court and prevented the court from holding the trial. Such an act by a lawyer can be characterized as nothing other than conduct calculated to hinder or obstruct a court in its administration of justice, or to derogate from its authority or dignity (People v. Hass.) Thus, it was criminally contemptuous. We affirm the lower court's finding of contempt.

However, we must reduce the fine imposed by the trial judge. Our Supreme Court, in County of McLean v. Kickapoo Creek, Inc. (1972), 51 Ill. 2d 353, held

that, where the record reveals that the defendant was not afforded a jury trial, or did not waive his right to a jury, the contempt fine cannot exceed $500. The record reveals neither a jury trial nor a waiver. Consequently, we order that the fine be reduced to $500.

AFFIRMED IN PART; MODIFIED IN PART.

SCOTT and STOUDER, JJ., concur.

C.

Order entered by the Circuit Court of Bureau County on September 2, 1983 in words and figures as follows:

This cause coming on for jury trial on the 29th of August, 1983, and the People of the State of Illinois being present by the Bureau County State's Attorney, James R. May, and the defendant not being present in court but represented and present by Louis E.

Olivero, his attorney, the Court finds as follows:

1. That this cause was set for trial on the merits on August 29, 1983, by order of this court on May 27, 1983.

2. That this court entered its order denying defendant's emergency motion for temporary restraining order on August 22, 1983.

3. That the court denied the defendant's application to stay the proceedings to perfect an appeal of the denial of the emergency motion for temporary restraining order on August 26, 1983.

4. That the court denied the defendant's motion for a continuance on August 26, 1983, and again ordered trial to proceed on August 29, 1983, as originally ordered on May 27, 1983.

5. That on the date for trial,

to-wit, August 29, 1983, attorney Louis E. Olivero, attorney for the defendant, appeared before this court and informed the court he had instructed the defendant not to be present in court for trial.

6. That again on August 29, 1983, this court, shortly before twelve o'clock noon, ordered attorney Louis E. Olivero to have his client present at 1:30 P.M. to begin trial.

7. That again on August 29, 1983, at approximately 1:30 P.M. attorney Louis E. Olivero appeared before this court and again informed the court that his client was not present for trial, even though he stated his client was available for trial in the City of Spring Valley.

8. That on August 29, 1983, at approximately 1:30 P.M. the court in-

formed attorney Olivero that the trial would proceed without the defendant being present and further ordered attorney Louis E. Olivero to proceed to the court room [sic] for the purpose of selecting a jury.

9. That at or about the same time and date, attorney Louis E. Olivero informed the court he was not going to proceed with the trial in this case, nor was he going to enter the court room [sic] for the purpose of selecting a jury in this case.

10. That on the same date and hour the court advised Mr. Olivero if he did not proceed to trial he would be found in direct criminal contempt of court and would be fined the sum of $1,009.00.

11. That at the same time and place and hour, after instructions and orders of the court on the same date and re-

ferred to above, the court found attorney Louis E. Olivero in direct criminal contempt of this court.

12. That the cost of having the jury present on August 29, 1983, was in the approximate total amount of $1,009.00, which included 52 jurors at $15.50 per day per juror, mileage for said jurors in the total amount of $153.00 and bailiffs [sic] salaries of $50.00.

IT IS THEREFORE ORDERED BY THE COURT AS FOLLOWS:

A. That attorney Louis E. Olivero is hereby found and declared to be in direct criminal contempt of this court.

B. That attorney Louis E. Olivero be and is hereby fined the amount of $1,009.00 for his direct criminal contempt.

C. That said fine is to be paid

within 30 days of the entry of this order. Said fine to be made payable to the Bureau County Circuit Clerk.

DATED: September 2, 1983.